



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-847]

Certain Mobile Phones and Tablet Computers, and Components Thereof

Commission Determination to Review in Part a Final Initial Determination Finding a Violation of Section 337; Schedule for Briefing on the Issues under Review and on Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part a final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”), finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in this investigation.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this

matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 8, 2012, based on a complaint filed by Nokia Corp., Nokia Inc., and Intellisync Corp. (collectively, "Nokia"). 77 FR 34063-64. The Commission's notice of investigation named as respondents HTC Corporation; HTC America, Inc. (together, "HTC"); and Exedea, Inc. ("Exedea"). *Id.* Prior to receiving the complaint and notice of investigation, counsel for Exedea announced that Exedea had dissolved as a legal entity. The complaint and notice of investigation sent to Exedea were returned as undeliverable, and no further action was taken to serve Exedea. The Office of Unfair Import Investigations did not participate in this investigation.

Originally, Nokia asserted numerous claims from nine patents against HTC. Throughout the course of the investigation, several IDs terminated the investigation with respect to various patents and claims. *See* Order No. 9 (Feb. 7, 2013) (terminating the investigation with respect to U.S. Patent No. 7,366,529 because the patent was covered by an arbitration agreement), *not reviewed* (Mar. 11, 2013); Order No. 10 (Apr. 12, 2013) (terminating the investigation with respect to U.S. Patent Nos. 7,106,293; 6,141,664; and 7,209,911 patents based on Nokia's motion to withdraw the patents), *not reviewed* (Apr. 30, 2013); Order No. 14 (May 14, 2013) (terminating the investigation with respect to U.S. Patent No. 6,728,530 based on Nokia's motion to withdraw the patent), *not reviewed* (May 29, 2013); Order No. 33 (June 13, 2013) (terminating the investigation with respect to U.S. Patent No. 5,570,369 based on Nokia's motion to withdraw the patent), *not reviewed* (July 12, 2013). By the time of the final ID, Nokia asserted only claim 1 of

U.S. Patent No. 5,884,190 (“the ‘190 patent”); claims 6, 8, 10, and 11 of U.S. Patent No. 6,393,260 (“the ‘260 patent”); and claims 2, 18, 19, 21, and 23 of U.S. Patent No. 7,415,247 (“the ‘247 patent”).

On May 2, 2013, the ALJ issued an initial determination (Order 13) finding that HTC could not establish its defense of patent exhaustion. Nokia and HTC both petitioned for review of Order 13. On June 4, 2013, the Commission determined to review Order 13, and stated that it would render its final disposition on Order 13 in conjunction with the final disposition of the final initial determination in this investigation. Accordingly, Order 13 remains under review.

On September 23, 2013, the presiding ALJ issued his final ID, finding a violation of section 337 with respect to claims 6, 8, 10, and 11 of the ‘260 patent and claims 18, 19, 21, and 23 of the ‘247 patent, and finding no violation with respect to the ‘190 patent and claim 2 of the ‘247 patent. The ALJ recommended that a limited exclusion order issue against all infringing articles imported, sold for importation, or sold after importation by HTC. The ALJ also recommended that a cease-and-desist order issue against HTC.

On October 23, 2013, HTC filed a petition for review challenging several grounds for the ALJ’s determination that HTC violated section 337. On October 31, 2013, Nokia filed a response in opposition to HTC’s petition.

Having examined the record of this investigation, including the ALJ’s final ID, the petition for review, and the response thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review the ALJ’s findings on claim construction, infringement, and the technical prong of the domestic industry requirement for the limitations “balance adjustment means” of the ‘260

patent and “different radio interfaces”/“different radio communications systems” of the ‘247 patent. The Commission has determined to review the ALJ’s remaining findings on infringement and the technical prong of the domestic industry requirement for the ‘247 patent. The Commission has also determined to review the striking of the testimony and witness statements of Dr. Colyannides. The Commission has determined not to review the remaining findings in the ID.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in briefing on the following issues:

1. Whether the phrase “comprising transistors, or implemented using a variable voltage source” is an appropriate modifier of the corresponding structure for the phrase “balance adjustment means” in the ‘260 patent.
2. Whether Nokia’s evidence with regards to the use of transistors in calibration is sufficient to establish HTC’s infringement of the “balance adjustment means” limitation in the ‘260 patent.
3. Whether Nokia abandoned its contentions with respect to claims 18 and 19 of the ‘247 patent by failing to set forth with particularity HTC’s infringement of the claim limitation “an input for receiving a digital baseband quadrature signal representing an information signal to be transmitted” in Nokia’s pre-hearing brief.
4. Whether a person of ordinary skill in the art, reading the phrase “different radio communications systems” in the context of the limitation “wherein said mixer is common for processing signals for transmission in at least two different radio communication systems, and wherein said transmitter amplifier is common for

amplifying carrier frequency signals for transmission to at least two different radio communications systems . . .” in light of the specification and prosecution history of the ‘247 patent, would have understood that the disclosed common mixer and common transmitter amplifier could be utilized with radio communications systems that differed in ways other than by frequency band.

5. Whether the Federal Circuit’s decision in *Lifescan Scotland, Ltd. v. Shasta Techs., LLC*, 734 F.3d 1361 (Fed. Cir. 2013), or any other relevant court decisions, affects HTC’s defense of patent exhaustion based on the transfer of rights under the Nokia-Qualcomm agreement.

The parties have been invited to brief only the discrete issues described above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties’ existing filings.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue a cease and desist order that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December

1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or a cease and desist order would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation. The Commission is particularly interested in briefing on the following issues:

1. HTC's statement on the public interest contends that the Qualcomm Magellan and Odyssey transceiver chips have become a *de facto* standard in the mobile devices industry. What evidence exists to support or refute HTC's contention? If HTC is correct, please discuss any evidence regarding whether the exclusion of HTC devices containing the Qualcomm Magellan and Odyssey chips raise any concerns similar to those raised by some commentators regarding patent hold-up in the FRAND-encumbered standards-essential patent context?
2. Several entities submitted statements on the public interest asserting that the Commission should consider in its public interest analysis the fact that HTC's accused products are complex devices comprising numerous components, whereas Nokia's infringement allegations are directed to a single component of the accused devices. How (if at all) should the Commission consider such a

factor in determining whether to issue such a remedy or in fashioning an appropriate remedy in this investigation?

3. How (if at all) should Nokia's covenant not to sue Qualcomm over the asserted patents affect the Commission's consideration of the public interest in determining whether to issue a remedy against HTC based on the functionality of Qualcomm components or in fashioning an appropriate remedy in this investigation?
4. Several entities submitted statements on the public interest asserting that there should be a transition period for any remedy issued against HTC. Please explain and provide evidence regarding whether such a transition period is warranted in this investigation. Additionally, please explain and provide evidence regarding the appropriate duration for any such transition period.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *FR* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such

submissions should address the recommended determination by the ALJ on remedy and bonding. The entirety of the parties' written submissions must not exceed 75 pages, and must be filed no later than close of business on December 23, 2013. Reply submissions must not exceed 50 pages, and must be filed no later than the close of business on January 6, 2014. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-847") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42-46 of the Commission's Rules of Practice and Procedure (19 CFR 210.42-46).

By order of the Commission.

Issued: December 9, 2013.

Lisa R. Barton,
Acting Secretary to the Commission.

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